No. 85-870 (3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, *et al.*,

Petitioners,

v.

ROBERT W. KELLEY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether the court of appeals correctly decided that, in conformity with the practice of this Court and virtually every other circuit, the determination of entitlement to attorneys' fees for a successful appeal in a civil rights case should be made in the first instance by the district court?

2. Whether the court of appeals, based on the facts of this case and its determination of the meaning of its own prior orders, correctly held that prevailing plaintiffs in this school desegregation suit were entitled to fees for work done prior to 1972, in conformity with

Bradley v. City of Richmond, 416 U.S. 696 (1974) and Hutto v. Finney, 437 U.S. 678 (1978)?

3. Whether the court of appeals correctly remanded this case to the district court for reconsideration of the amount of the fee award under proper legal standards?

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OF NASHVILLE AND DAVIDSON COUNTY
TENNESSEE, et al.,

Petitioners,

v.

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On Petition for Writ of Certiorari to
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for the Sixth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondents respectfully urge that this case presents no issues that warrant review by this Court. Rather, it

involves: (1) an internal operating procedure of the Sixth Circuit; (2) a nonrecurring issue relating to the retroactive application of the attorney fee statutes; and (3) the specific facts relating to an appropriate fee award in this case.

STATEMENT OF THE CASE

This school desegregation case, which was filed one year after Brown v. Board of Education, 347 U.S. 483 (1954), is finally reaching its end. Filed in 1955 against the Nashville, Tennessee Board of Education, in 1963 it was consolidated with a parallel class action suit initiated against the Davidson County Board of Education in 1960. Although plaintiffs continued to press for relief, no significant school desegregation had occurred by the end of the decade. On July 16, 1970,

the District Court enjoined defendants from any construction and ordered the Board to develop a comprehensive desegregation plan. Kelley v. Metropolitan Board of Education, 317 F. Supp. 180 (M.D. Tenn. 1970).

The Board submitted its plan on August 25, 1970, but the District Court effectively stayed its order until the Supreme Court's resolution of pending school desegregation cases. The Court of Appeals for the Sixth Circuit vacated the stay and reinstated the District Court's order and noted that ". . . the instant case is growing hoary with age." Kelley v. Metropolitan Bd. of Ed., 436 F.2d 856, 858 (6th Cir. 1970). Upon remand the district court heard various desegregation plans, and selected an HEW plan. The Sixth Circuit affirmed. Kelley v.

Bd. of Ed., 463 F.2d 732 (6th Cir. 1972), cert. denied, 409 U.S. 1001 (1972), noting that "[t]he order of the District Judge is the first comprehensive and potentially effective desegregation order ever entered in this litigation." 463 F.2d at 734 (emphasis added).

During the ensuring years the plaintiffs continued to press for complete and effective relief, moved for the addition of new parties-defendant, objected to proposed attendance zone changes and school utilization plans and sought a more equitable distribution of desegregation burdens.[1] Between 1973 and 1979 the District Court did not take any action in this case, although the School Board filed various petitions relating to

[1] For a detailed account of events between 1971 and 1975, see 492 F. Supp. 172-75.

construction and the utilization of facilities. The plaintiffs responded to these petitions and filed motions for contempt in 1976 and 1979. In the latter motion plaintiffs alleged that the Board did not implement the 1971 plan in good faith and that the Board had contrived to perpetuate segregation.

The District Court held hearings in August of 1979. After finding that the Board had violated the spirit of the 1971 order, the District Court ordered it to devise a new comprehensive desegregation plan. After further hearings in the spring of 1980, the District Court held that the 1971 plan had been ineffective and gave specific direction to the Board on the necessary elements of a new plan. Kelley v. Metropolitan Bd. of Ed., 492 F. Supp. 167 (M.D. Tenn. 1980).

The Board filed its plan on January 19, 1981, and plaintiffs filed objections on March 25, 1981. After a further hearing on March 30, 1981, the District Court rejected plaintiffs' plan and ordered implementation of the Board's plan. The court also lifted its 1971 restriction on new construction. Kelley v. Metropolitan Bd. of Ed., 571 F. Supp. 1363 (M.D. Tenn. 1981). The Sixth Circuit's opinion and order, which affirmed in part and reversed in part, remanded for, inter alia, the development and implementation of a more comprehensive student assignment plan and for resolution of plaintiffs' unresolved requests for attorneys' fees dating back to the inception of the lawsuit. Kelley v.

Metropolitan Bd. of Ed., 687 F.2d 814 (6th Cir. 1982), cert. denied, 459 U.S. 1183 (1983).

On remand, the parties agreed to a final desegregation plan which, hopefully, will result in a desegregated and unitary system. The issue in the case as it reaches this Court relates solely to the appropriate amount to be awarded as attorneys fees to plaintiffs' counsel for their unremitting efforts over three decades to finally bring the Nashville school system into compliance with the law of the land as declared by this Court in 1954.

The initial attorneys' fee application was filed in early 1974. However, no action was taken on it by the district court until 1982. Pet. p. A-2. Through a variety of procedural rulings the district

court limited the award to $139,000, far less than the school board paid to counsel to defend it in its attempts to evade its obligations under the law.[2] The court of appeals held, rightly, that the amount awarded was inadequate and has remanded the case to the district court for further proceedings to determine the appropriate award.

None of the questions decided by the court of appeals are of such general applicability that they require review by this court. Rather, they arise from the specific factual context of the present case, relate to internal operating

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[2] As the court of appeals noted, in one five-year period alone, the defense attorneys received $288,000 in fees. Pet. p. A-16, n. 8.

procedures of the court of appeals, and to that court's interpretation of the meaning of its prior orders.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The Sixth Circuit's Ruling Regarding The Relationship Between Costs And Attorneys' Fees Does Not Conflict With The Rulings of Any Other Court of Appeals Or of This Court.

The first issue presented by the petition in fact relates primarily to the procedures to be followed by a court of appeals in awarding attorneys' fees relating to a successful appeal in a civil rights case. The decision of the court below has put it in conformity with the practice of every other court of appeals, save two,[3] and is fully consis-

[3] Only the Eighth and Ninth Circuits have

tent with the civil rights attorneys' fees statutes and Rule 39(a), F. R. App. Proc.

The practice of the courts of appeals and of this Court is to award costs mandated by rule or statute automatically under certain circumstances. Thus, for example, if an appellant prevails he will ordinarily be reimbursed for printing the appendix, for filing fees, and, in the circuit courts, for printing the briefs.[4] On occasion, where, for example, there have been cross-appeals and the court has affirmed the judgment of the lower court in toto the appellate court will simply

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adopted the practice of the appellate court determining fee awards for appeals in civil rights cases. Rule 17, Rules of the United States Court of Appeals for the Eighth Circuit, Rule 14(g) of the Rules of the United States Court of Appeals for the Ninth Circuit.

[4] Rule 50, Rules of the Supreme Court of the United States; Rule 39, F.R. App. Proc.

provide that both parties will bear their own costs.[5] With the exceptions of the Courts of Appeals for the Eighth and Ninth Circuits , on the other hand,[6] the practice of the courts of appeals has been to leave the award of attorneys' fees with regard to appeals to the district court when, at the end of either the entire case or some discreet part thereof, it deals with the issue of entitlement to fees. The advantage of this practice as a practical matter, of course, is that where an attorneys' fee application is disputed issues relating to the appropriate amount may be resolved in a forum appropriate for the taking of evidence.

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[5] See, Rule 39, F.R. App. Proc., giving discretion to the court in assesssment of costs where a judgment is affirmed or reversed in part.

[6] See, n. 3, supra.

In Buian v. Baughard, 687 F.2d 859 (6th Cir. 1982), the Sixth Circuit departed from this procedure and announced that a prevailing plaintiff would not receive fees for appellate work unless he had already been awarded costs for the appeal. Thus, it equated the standards for awarding costs under Rule 39 and awarding fees under 42 U.S.C. § 1988.

Despite the announcement of this rule by one panel of the Sixth Circuit, various other panels did not follow it in practice, and there were a series of orders sending back to the district court the question of the disposition of fee requests for work done on appeal.[7] In the

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[7] See e.g., Greer v. Holt, No. 80-1548, Order of November 9, 1983; Buchanan v. City of Jackson, No. 81-5333, Order of April 23, 1984; Rowe v. Cleveland Pneumatic Company, No. 80-1407; King v. Roberts, No.82-5427, Order of Oct. 7, 1983; League of Women Voters of Tennessee v. Collins, No.81-5625, Order of Dec. 22, 1983. See

present case the original panel avoided the Buian rule by holding that it only applied to appeals decided after its announcement. Therefore, it was inappropriate for the district court to deny fees to the plaintiffs for successful appeals disposed of before Buian was decided.

Faced with the confusion which Buian had generated between panels of the court, the Sixth Circuit appropriately decided to deal with the question en banc in the present case. It held that because of the different standards for awarding attorneys' fees in civil rights cases and in awarding costs under Rule 39, the appropriate procedure to follow would be to have a district court award fees to prevailing plaintiffs for appeals in which

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also, Green v. Francis, No.81-5870, Order of June 20, 1983.

they were successful irrespective of whether costs were awarded under the rules of appellate procedure. (Pet., pp. A-6 to A-9.)

This is precisely the practice followed by virtually all other courts of appeals and, indeed, is the practice followed by this Court. Clearly, prevailing plaintiffs are entitled to fees for the time spent on successful appeals,[8] and just as clearly courts of appeals and this Court are ill-equipped to determine the amount of such fees. Since the standards for fees are different than the standards for awards of costs, the automatic and mechanical linking of the

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[8] See, e.g., Mims v. Wilson, 514 F.2d 106 (5th Cir. 1975); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).

two, as was done in Buian, was in error and the court of appeals below has adopted the appropriate practice.

The petitioner's attempts to argue that there is no difference between fees and costs is simply a semantic game. For example, a successful defendant-appellee would be entitled to costs incurred in the court of appeals for printing its brief as matter of course.[9] It would not, however, be entitled to attorneys' fees as a matter of course since a defendant may only receive fees under the strict standards of Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). Conversely, a plaintiff-appellant may receive its appellate costs as a matter of course if successful on appeal from a dismissal of the action but would not be entitled to fees for that

[9] Rule 39(a), F.R. App. Proc.

appeal unless and until it was successful in some degree on the merits. Hanrahan v. Hampton, 446 U.S. 754 (1980).

Thus, the sum and substance of the decision of the court below to reject its own rule in Buian, is one of the procedures to be followed by the Sixth Circuit. None of the cases cited from other circuits by petitioner took the position of the Buian panel and, therefore, there is no conflict. Nor is the decision in conflict with Marek v. Chesny, ____ U.S. _____, 87 L.Ed.2d 1 (1985) which dealt with an entirely different question relating to the relationship of attorneys' fees and costs under Rule 68.

Finally, the petitioner's suggestion that the decision below is in conflict with the Eleventh Amendment, is totally without foundation. First, this action

involves local government bodies, Davidson County and the county school board. This Court has long held that the Eleventh Amendment does not apply to local governmental units.[10] Second, this Court held squarely in Hutto v. Finney, 437 U.S. 678 (1978), that there was no Eleventh Amendment bar to the award of attorneys' fees even against states.

II.

There Is No Conflict Between The Circuits With Regard to The Availability of Fees for Work Done Prior to 1972

Petitioners, by their second question presented, similarly seek to construct a significant issue involving a conflict between circuits where there simply is

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[10] See, Mount Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 280 (1977) and cases there cited.

none. At issue in this case was whether the Sixth Circuit's disposition of earlier appeals constituted such a break in the litigation that fees should not be awarded for work done prior to the effective dates of the subsequently enacted attorneys' fees statutes.[11]

First this question lacks importance because it is unlikely to be recurring. Counsel for respondents have been involved in virtually all of the school desegregation litigation that arose prior to the effective date of the 1972 and 1976 fees acts. To our knowledge, there are at best two or three cases, that may involve issues even remotely similar to the one

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[11] 20 U.S.C. § 1617 (1972) and 42 U.S.C. § 1988 (1976).

presented here. See, e.g.,Gaines v. Dougherty County Bd. of Education, 775 F.2d 1565 (11th Cir. 1985).

Rather, the question of entitlement to fees for work done prior to the enactment of these statutes was largely disposed of by this Court's decisions in Bradley v. School Board of Richmond, 416 U.S. 696 (1974) and Hutto v. Finney, supra. In a few cases, the question arose whether there had been a break in the litigation either through the entry of a final desegregation order or through the final disposition of a fee application prior to the effective dates of the fee statutes. With the exception of the present case and Gaines those cases were decided years ago.[12]

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[12] The cases cited in the Petition for Writ of Certiorari at pp. 16-20 are essentially all of the cases in which the issue arose.

In each instance, whether fees could be recovered for pre-1972 work depended on the peculiar facts of each case and of courts of appeals' interpretations of their own disposition of earlier appeals. In Gaines, for example, whether or not plaintiffs' attorneys were entitled to fees for pre-1972 work was dependent on the meaning of prior orders of the appellate court that vacated or reversed district court orders relating to desegregation plans out that did not implicitly dispose of appeals of denials of attorneys' fees. The Eleventh Circuit reviewed the record and dispositively interpreted the meaning of its prior orders.[13]

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[13] The earlier decisions were rendered by the Fifth Circuit before its split into the Fifth and Eleventh Circuits.

Here, similarly, the issue of entitlement to fees for pre-1972 work depended on the interpretation of the meaning and effect of earlier orders within the peculiar facts of this case. The court of appeals, interpreting its own earlier decisions as well as those of the district court, concluded that there had been no break in the litigation, either actual or by contemplation of the parties. Therefore, there was no bar to the award of fees to which the plaintiffs would otherwise be clearly entitled under the decisions of this court in Bradley and Hutto. In light of the facts that (1) the disposition of this question depends on the specific facts of the case and the court of appeals' interpretation of its

own orders and (2) the unlikelihood of the issue recurring, there is no warrant for review by this court on certiorari.

Further, the alleged conflict between circuits simply does not exist. In all instances the courts of appeals, in deciding whether the fees to which plaintiffs were presumptively entitled under Bradley should be denied, have applied the same legal standards and have determined the question according to the peculiar facts of the case before it. Thus, there is no necessity for review of the question by this Court.

III.

The Question of the Calculation of the Amount of Fees Does Not Warrant Review By This Court.

With regard to the final question, there is similarly no basis for invocation of this Court's discretionary review. The court of appeals determined that the district court had determined an hourly rate based on improper legal standards. It remanded the case to the district court for determination of the rate on an appropriate basis. Given the peculiar factual issues raised in a disputed fee proceeding, the question does not present any overriding issues that have not already been sufficiently addressed by this court in its recent decisions in Hensley v. Eckerhart, 461 U.S. 424 (1983),

and Blum v. Stenson, ___ U.S. ___, 79 L.Ed. 891 (1984), which were cited and followed by the court below.

Thus, for example, the court of appeals applied the Blum rule that attorneys are to be awarded hourly rates that are within the parameters of customary fees in the community. The district court was directed to redetermine a proper hourly rate, which had to be at least the minimum that the record established was appropriate.

CONCLUSION

For the foregoing reasons, the issues in this case do not require review by this Court. The petition for writ of certiorari should be denied.

Respectfully submitted,

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